

Study N-300

January 3, 1999

First Supplement to Memorandum 99-8**Administrative Rulemaking: Draft of Tentative Recommendation —
Comments of California State Employees Association**

We received letters regarding Memorandum 99-8 from the California State Employees Association (CSEA) and a representative of the Association of California State Attorneys and Administrative Law Judges, the Professional Engineers in California Government, and the California Association of Professional Scientists (ACSA, PECG, and CAPS). These letters are attached.

CSEA opposes adding an exception to the rulemaking requirements of the APA for individual advice, adjudicative decisions, or an agency restatement of advice or adjudicative decisions, and opposes expanding the existing exception for matters of agency internal management.

ACSA, PECG, and CAPS also oppose codification of the rulemaking exceptions expressed in *Tidewater*.

Respectfully submitted,

Brian Hebert
Staff Counsel



California State Employees Association

Local 1000, SEIU, AFL-CIO, CLC

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VIA FACSIMILE AND FIRST CLASS MAIL

February 3, 1999

California Law Revision Commission
Attn.: Brian Hebert
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Re: Administrative Rulemaking (Study N-300)
Draft Tentative Recommendation Memorandum 99-8

Dear Mr. Hebert:

The California State Employees Association (CSEA) has reviewed Memorandum 99-8 and is opposed to the Law Revision Commission's recommended changes to the Administrative Procedure Act. Specifically, CSEA is opposed to adding "individual advice," adjudicative decision and agency restatement exceptions and the expansion of the internal management exception.

Advice Letters

The addition of an individual advice exception is unnecessary. As noted in Memorandum 99-8, Government Code section 11343(a)(3) already provides an exception for letters "directed to a specifically named person or to a group of persons and does not apply generally throughout the state." (Memorandum 99-8, p. 2.) The Office of Administrative Law (OAL) has correctly interpreted this exception as not applicable if the advice letter is a standard of general application. The LRC's recommended changes would broaden the exception so widely that an agency could avoid the APA's notice and comment requirements by simply announcing a regulation in letter form. Furthermore, the reasons for LRC's proposed changes are contrary to the purposes of the APA:

An agency should be able to provide individual advice in response to a request for such advice, without adopting a regulation, even if the advice might also apply to an identifiable class of other persons. To deny advice to a member of the public, simply because the requested advice might apply to others (to who the advice is not transmitted), would not serve the public interest. (Memorandum 99-8, p. 3.)

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If the advice applies to an identifiable group of persons *throughout the state*, then this advice is a regulation as defined by Government Code section 11342(g), regardless of whether or not it is technically addressed to an individual. The fact that such advice would not be transmitted to other individuals to whom it applies is directly inapposite to the APA and is exactly why the APA was enacted: to notice the public of the law's requirements so that they can conform their conduct accordingly. CSEA is perplexed at the LRC's position that this notice would not serve the public interest.

Adjudicative Decisions

CSEA is not opposed to excepting adjudicative decisions from the APA, *when the Legislature has expressly exempted specific agencies* (e.g., Public Employment Relations Board, State Personnel Board) from the APA and allows such agencies to use such decisions to interpret its laws and regulations in lieu of promulgating additional regulations. These agencies' adjudicative decisions are published and give notice to the public of new or amended rules. In these situations, the Legislature has made a determination that these agencies are exempt based upon policy considerations, including the provision of sufficient notice and due process.

However, the LRC recommendation is not "codifying the *Tidewater* exception for interpretations arising in the course of adjudication." (Memorandum 99-8, p. 4.) The statement referred to in *Tidewater* is taken out of context; it is dicta in the discussion of the Court's analysis of the advice letter exception in Government Code sections 11343(a)(3) and 11346.1(a). If a decision of an agency is not specifically exempted by statute, and could be applied to an identifiable class of persons and applied statewide, then it is a regulation and is subject to the APA. CSEA opposes this proposal for the same reasons as it opposes the advice letter proposal.

Agency Restatement

CSEA is also opposed to making an exception for an agency's restatement of individual advice letters and adjudicative decisions. LRC is correct in questioning the utility of a manual of case-specific interpretive decisions and individual advice letters if it has no precedential value and cannot be relied upon by the public. Because individuals might rely on such a publication as the agency's position or interpretation of law, the publication of such a manual may actually have the effect of making the decisions and letters—which were properly exempted from the APA—standards of general application and improperly promulgated regulations.

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Internal Management Exception

The APA currently exempts an agency rule that relates only to the internal management of the state agency. (Government Code section 11342(g).) The courts and the OAL properly hold that if such a rule affects persons outside the agency or involves a significant public interest, then it is a regulation subject to the APA. The "significant public interest" provision should not be abolished. As noted in Memorandum 99-8, p. 9-10, agency rules that do not directly affect the legal rights and obligation of persons outside the agency still could be of significant public interest to justify requiring such rules to be subject to the APA. In addition to the examples LRC has already enumerated, another example is illustrated in 1998 OAL Determination No. 36, wherein OAL found that the Department of Motor Vehicle's (DMV) improperly promulgated rules when it issued attendance restriction guidelines. These guidelines interpreted and made specific certain Government Code sections, Department of Personnel regulations and the collectively bargained memoranda of understanding between the State and employee unions. Although these guidelines directly affected only DMV employees, the internal management exception did not apply because the guidelines involve matters of serious public interest: the privacy protection of a person's medical history and records and fair standards governing the discipline of public employees.

As discussed above, these recommended amendments to the APA are not a codification or clarification of the *Tidewater* case. Rather, like the proposed amendments in SB 209 and the LRC's Study N-200 (Judicial Review of Agency Action), these amendments ignore the legislative intent and undermine the purpose of the APA. The APA was enacted to ensure that those persons or entities who regulation will affect have a voice in its creation, as well as notice of the law's requirements.

Thank you for your consideration. Please call me if you have any questions or would like to further discuss this matter.

Sincerely,

GARY P. REYNOLDS
Chief Counsel



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February 3, 1999

*Transmitted Via
Facsimile & U.S. Mail*

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RE: Administrative Rulemaking (Study N-300)
Draft Tentative Recommendation Memorandum 99-8

Dear Mr. Hebert:

ACSA, CAPS and PECG offer these initial comments regarding the draft tentative recommendations contained in Memorandum 99-8. Recent experiences with state agencies, specifically the Department of Personnel Administration, have heightened our concern with regard to the administrative rulemaking process and its impact on the members we represent in their employment relationship with the state.

ACSA, CAPS and PECG are opposed to the codification of the exceptions the staff memorandum states are found in Tidewater. To the extent the proposed statutory changes do nothing more than codify existing law they are unnecessary. The concern is that the changes appear to expand and promote the use of what are now considered underground regulations. The proposed changes would unnecessarily replace the case by case determination of whether an item is subject to the rulemaking process that is currently required under the law with blanket rules that unwisely exempt categories of regulations from the Administrative Procedure Act.

ACSA, CAPS and PECG would also discourage the Commission from creating an exception to the rulemaking procedures for unannotated restatements of agency advice and adjudicative decisions. The publication of a manual containing such material would be the equivalent of an agency announcing rules of general application, an act that otherwise is and should continue to be covered by the APA.

Very truly yours,

Gerald James
Labor Relations Counsel

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